UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF RHODE ISLAND

C.A. 03-148L	Tammy Passa v. Jeffrey Dererian et al.
C.A. 03-208L	Ronald Kingsley v. Jeffrey Derderian et al.
C.A. 03-335L	George Guindon v. American Foam Corp. et al.
C.A. 03-483L	Estate of Jude B. Henault v. American Foam Corp. et al.
C.A. 04-26L	Linda Roderiques v. American Foam Corp. et al.
C.A. 04-56L	Charles Sweet v. American Foam Corp. et al.
C.A. 04-312L	Albert Gray v. Jeffrey Derderian et al.
C.A. 05-002L	Andrew Paskowski v. Jeffrey Derderian et al.

PLAINTIFFS' MEMORANDUM IN OPPOSITION TO THE RULE 12(b)(6) MOTIONS TO DISMISS PLAINTIFFS' FIRST AMENDED MASTER COMPLAINT FILED BY DEFENDANTS LEGGETT & PLATT, INCORPORATED, L&P FINANCIAL SERVICES CO., GENERAL FOAM CORPORATION, GFC FOAM, LLC, FOAMEX LP, FOAMEX INTERNATIONAL INC., FMXI, INC., PMC, INC., AND PMC GLOBAL, INC.

Defendants re-filed 12(b)(6) Motions to Dismiss should be denied.[1] They are without merit and, at best for Defendants, are prematurely filed. Plaintiffs file this reply memorandum to specifically rebut one argument made in Defendants' memoranda in support of their re-filed 12(b)(6) motions to dismiss.

I. Defendants' Failure To Meet Its Heavy Burden Under Rule 12(B)(6)

Defendants have misconstrued the meaning of Rule 8(e)(2)'s reference to "inconsistent" and "alternative" pleadings. They erroneously argue that because a number of factors may have combined to cause the Station Fire, that Plaintiffs are unable to assert "alternative" and "inconsistent" factual and legal allegations as to any material issue in this case. They also mistakenly assert that unless a rigid stylistic

[1] Plaintiffs hereby incorporate by reference all arguments made in their earlier-filed reply and sur-reply memoranda and in Plaintiffs' counsels' oral argument at the hearing held on December 9, 2004 on Defendants' 12(b)(6) Motions to Dismiss Plaintiffs' original complaint.

format is adhered to ("either/or", "even/if") no inconsistency can be found to exist. Neither proposition is valid.

One example of the "alternative" and/or "inconsistent" contentions set forth Plaintiffs' First Amended Master Complaint as between the foam counts and all other counts involves the factual allegations concerning causation. Plaintiffs clearly allege the conduct of the foam companies was the cause of the Station Fire. This contention is alternative to and inconsistent with the allegations of fact and law concerning causation claims against other Defendants. Defendants' "superseding causation" contentions prove the inconsistency and alternative nature of Plaintiffs' causation claims.

As the First Circuit Court of Appeals has noted in Rodriguez-Suris et al. v. Montesinos et al.:

> This argument fails adequately to take into account a procedural provision, in Federal Rule of Civil Procedure 8(e)(2), that allows parties to take inconsistent positions in their pleadings. Especially at the early stages of litigation, a party's pleading will not be treated as an admission precluding another, inconsistent, pleading. See Gens v. Resolution Trust Corp., 112 F.3d 569, 573 & n. 4 (1st Cir.1997) (noting the relaxed standard of the Federal Rules that allows alternative pleadings); Aetna Cas. Sur. Co. v. P & B Autobody, 43 F.3d 1546, 1555 (1st Cir. 1994) ("Because procedural law allows alternative contentions, parties to a civil action involving such an array of factual and legal theories as this case presents may be allowed to defer choice at least until late stages of proceedings in the trial court."); McCalden v. California Library Ass'n, 955 F.2d 1214 (9th Cir. 1990) (holding that allegations should not be construed as an admission against inconsistent claims), cert. denied, 504 U.S. 957, 112 S.Ct. 2306, 119 L.Ed.2d 227 (1992); Molsbergen v. United States, 757 F.2d 1016, 1018-19 (9th Cir.) (same), cert dismissed, 473 U.S. 934, 106 S.Ct. 30, 87 L.Ed. 2d 706 (1985).

123 F.3d 10 at 21.

Also, Defendants' reliance on the Schott decision is misplaced. Schott Motorcycle Supply, Inc. v. American Honda Motor Co., Inc., 976 F.2d 58, 62, (1st Cir.

1992). First, Schott is entirely distinguishable on its facts. In that case, no internal inconsistency in fact or law existed either in the plaintiffs' complaint, or in a later filed amended complaint. A clear judicial admission was made by plaintiffs that they were a party to a 1985 agreement. It was not until the defendants filed a summary judgment motion that plaintiffs sought to escape the effect of their prior admission. ("The court rejected Plaintiffs' argument, raised for the first time during summary judgment proceedings, and now pressed before us, that the 1985 franchise agreement was, in effect, revoked when on January 1, 1987 the principals of the dealership were changed and Schott Motorcycle changed from a proprietorship to a corporation.") Id at 61.

It appears the Defendants conflate the concepts of "inconsistent" and "alternative". In fact, Rule 8(e) expressly authorizes "alternative" claims, and although the rule makes no specific mention of "inconsistent" claims, it is patently obvious the rule sanctions the assertion of factually and/or legally inconsistent claims. At the same time, Rule 8(e) does not require that alternative claims be factually or legally inconsistent. The foam Defendants would appear to argue that the factual allegations asserted against other Defendants are not inherently, factually inconsistent with the factual allegations asserted against the foam Defendants, (i.e. that both claims could factually exist at the same time), and therefore the claims are not "inconsistent". (See Foamex Supplemental Memorandum, p. 3, "The only reasonable reading of the Amended Complaint is that it sets forth wholly consistent theories of recovery against multiple defendants."). In a very real sense, the Defendants want this Court to conclude, as a matter of fact, that such alternative facts do exist, concurrently as it were, and to deem such allegations against non-foam defendants to be treated as

judicial admission for purposes of the foam Defendants' motions to dismiss. The Defendants Motion to Dismiss is, in reality, a backdoor approach to summary judgment.

As made clear in Rodriguez-Suris et al v. Montesinos, supra, Rule 8(e)(2) allows for alternative claims, not merely the pleading, alternatively, of inherently inconsistent facts. Applied generally to the allegations in the Amended Master Complaint, the alternative pleading merely affords the Plaintiffs the opportunity to establish that the Defendants' conduct was the sole proximate cause of Plaintiffs' injuries, or a concurring proximate cause. It would completely undermine the express policy of alternative and inconsistent pleading sanctioned by Rule 8(e)(2) if a party were not allowed to bring claims against, for instance, two parties, either or both of whom may be liable to the Plaintiff. What anomaly would result if the Defendants' contention held sway. By way of example, a plaintiff might allege in separate counts that two parties caused his/her injury. Were a defendant allowed to defeat such alternative pleading, as the Defendants seek to do here, discovery or trial could very well exonerate the remaining Defendant, with all responsibility seeming to then rest with the earlier-dismissed defendant. The rule of alternative/inconsistent pleading seeks to prevent such a manifest injustice. The rule seems particularly appropriate in a complex, fact-intensive case such as the matter at bar.

In the present case, clear alternative and inconsistent factual and legal contentions exist in Plaintiffs' First Amended Master Complaint. This is especially true as to the Plaintiffs' factual and legal contentions concerning the causal affect of the conduct of the Defendants. As is mentioned above, Defendants' instant motions prove Plaintiffs' point in this regard. Second, Schott's parenthetical reference to "either-or"

and "if then" pleadings in no way prescribes an exclusive methodology for alternative and/or inconsistent pleadings, especially when such inconsistencies exist between the contentions in separate and discrete counts of a complaint. See Molsbergen v. United States, 757 F.2d 1016, 1018-19 (9th Cir.)(same)(cert dismissed) 473 U.S. 934 (1985).

II. Even Where There Is Subsequent Negligence, In Product Liability Cases It May Be A Concurring Cause

The Defendants attempt to make much of the alleged subsequent negligence of other actors, as for instance the failure municipal and state defendants to discover the hazard posed by the foam. In its quest to have this Court, in ruling on its own motions to dismiss, assume as proven facts those allegations asserted against other Defendants, the Defendants fail to allow for any set of facts other than one which supports its assertions of unforseeability and supervening acts. However, the non-discovery of a hazard, whether negligent or not, may be totally foreseeable. Indeed, the most punctilious expert inspection of The Station, conducted with frequent regularity, would not necessarily have prevented a catastrophe caused by defective foam.

By way of illustration only, the installation of the defective foam and subsequent fire could have occurred after such a flawless inspection. A foam manufacturer cannot legitimately expect an inspection to remedy the problem it created, nor could it claim that a failure by an inspector, (whether negligent or not), to prevent the disaster is an independent, intervening cause, inasmuch as the result can be the same whether or not an inspection takes place. Therefore, non-discovery of defective foam by an inspector, whether negligent or not, is completely foreseeable. Whether there was no inspection, or the very best inspection just preceding the foam installation, the result would be

exactly the same as if a negligent inspection failed to reveal the dangerous condition. It follows that a negligent inspection is hardly "intervening" in a causal sense. Put simply, even if there is intervening negligence, in a product liability case there may be concurring causes, and a later cause is not necessarily supervening. Put another way, the foam Defendants may be liable even if no other defendant is negligent.

III. The First Amended Master Complaint Does Not Allege That Subsequent Inspections Were Negligent

Notwithstanding the foregoing discussion, it is important to note the allegations made against the foam Defendants in the First Amended Master Complaint do not allege that inspections were negligently performed. Rather, it is asserted the inspections were "inadequate"; that is, they were inadequate to appreciate the particular hazard present. As discussed above, whether such inspections were merely inadequate to detect the hazard, or provably negligent, should have no bearing on whether a concurring cause is "intervening". If this Court construes the language in the counts against the foam Defendants (i.e. "inadequate inspections were foreseeable") in the First Amended Master Complaint as alleging acts of negligence on the part of others, the Plaintiffs would respectfully request leave to amend those counts so as to unquestionably eliminate any such interpretation, whether directly or by implication

IV CONCLUSION

Even if Defendants are correct in their 8(e)(2) analysis, which Plaintiffs contend they are not, their 12(b)(6) motions still should be denied as being without merit and premature. Plaintiffs have clearly satisfied the requirements of Rules 8(a) and 12(b)(6).

The issues underpinning Defendants' arguments (i.e. foreseeability of both risk and harm, superseding causation, etc.) are fact-based. Plaintiffs are unaware of any court decision applying Rhode Island law in which a 12(b)(6) motion has ever been granted on issues such as those in question here.

For the above reasons and those incorporated by reference from prior memoranda and oral argument, Defendants' 12(b)(6) Motion should be denied.

Respectfully submitted,

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I hereby certify that on the **26th** day of January 2005 a true copy of the within was emailed to:

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